FILED

AUG 01 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL C. DURRELL,

Plaintiff - Appellant,

v.

DAVID COOK, Director, Oregon Department of Corrections; NICHOLAS ARMENAKIS; ROBERT LAMPERT; BRAD HEATH, Assistant Superindant Snake River Correctional Institution; JOE KLIKA, Security Manager Snake River Correctional Institution; RHONDA ORR, Captain of Disciplinary Segregation Snake River Correctional Institution; D. WILSON, Captain of Housing Assignment Snake River Correctional Institution,

Defendants - Appellees.

No. 00-36049

D.C. No. CV-99-01566-AJB

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted February 3, 2003

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Seattle, Washington

Before: KLEINFELD and McKEOWN, Circuit Judges, and SHAPIRO,** District Judge.

Plaintiff Paul Durrell appeals the grant of summary judgment for defendants in his 42 U.S.C. § 1983 action for violation of his Eighth Amendment rights. We reverse.

Durrell was housed for one week, despite his protests, with an inmate he alleges is an "aggressive homosexual." Durrell claims he was subjected to "overwhelming mental and emotional stress" from being housed with the sexually aggressive cellmate. In addition, he claims that he was injured defending himself from his cellmate, and sought medical attention for his injury (though this is disputed). We have held that mental injury suffices for Eighth Amendment cruel and unusual punishment cases,[1] and physical injury for which medical care is sought does as well. If this injury is self-inflicted in the course of self-defense

---

**The Honorable Norma L. Shapiro, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1]See, e.g., Jordan v. Gardner, 986 F.2d 1521(9th Cir. 1993) (en banc); Keenan v. Hall, 83 F.3d 1083 (9th Cir. 1996).

against a rape, it is properly treated as caused by the attempted rape.[2] A genuine issue of material fact exists as to whether the injury suffered by Durrell was caused by deliberate indifference to his safety.

Under Farmer v. Brennan,[3] and Redman v. County of San Diego,[4] an Eighth Amendment violation is established if prison officials "know[] of and disregard[] an excessive risk to inmate health or safety," and incarcerate him under conditions posing a substantial risk of serious harm, such as rape by a cellmate. Even assuming the officers in question knew only what the computer told them about Durrell's cellmate, there was sufficient information from which a jury could find "deliberate indifference." The computer records indicate that the cellmate had anally raped a sixteen year-old boy, and showed his assaults on other inmates, and a threat to rape another inmate.

---

[2]Cf., Restatement (Second) of Torts § 825 (1979) (conduct intentional if torfeasor knows damage is "substantially certain" to result from conduct).

[3]511 U.S. 825 (1994).

[4]942 F.2d 1435 (9th Cir. 1991).

"[S]ummary judgment based on qualified immunity is improper if, under the plaintiff's version of the facts, and in light of the clearly established law, a reasonable officer could not have believed his conduct was lawful."[5] As the district court acknowledged, the legal principles governing defendants' conduct were clearly established at the time Durrell was double celled with an aggressive homosexual.[6] Even in the face of clearly established law, the district court determined that, based on the evidence in the record, a reasonable prison official could have believed the double-celling arrangement was lawful.

We have decided a genuine issue of material fact exists regarding whether the injury suffered by Durrell was caused by deliberate indifference to his safety. If it is determined subsequently that a violation did occur, no reasonable officer could have believed that defendants' conduct was lawful, so defendants are not entitled to qualified immunity. This is not to say that each of the named defendants bears responsibility for a violation, should one be found; under Monell v. Dept. of

---

[5]See Schwenk v. Hartford, 204 F.3d 1187, 1196 (9th Cir. 2000).

[6]See Redman, 942 F.2d at 1443 (prison officials violated the Eighth Amendment by housing an aggressive homosexual with a "young and tender" heterosexual male); Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("[Defendant prison officials] recognize their duty under Redman ... .").

Social Services of City of New York,[7] there is no respondeat superior liability for an Eighth Amendment violation. On remand, the district court is not precluded from dismissing those defendants who had no personal involvement in housing Durrell with a sexually aggressive cellmate.

REVERSED AND REMANDED.

[7]436 U.S. 658, 694 (1978).